Ketua Polis Negara v Indira Gandhi a/p Mutho

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO A-01–365–09 OF 2014
ABDUL AZIZ AB RAHIM, TENGKU MAIMUN AND AHMADI ASNAWI JJCA
17 DECEMBER 2014

Civil Procedure — Prerogative writs/orders — Mandamus — High Court granted wife of man who converted to Islam custody over their child — Husband held in contempt for failing to obey order to return child to mother — Court directed police to arrest and jail husband for contempt and to recover child under Child Act 2001 — Inspector General of Police ('IGP') refused to execute orders because Shariah Court had granted husband custody of child — Whether Shariah Court's custody order invalid — Whether High Court wrong to have issued order of mandamus compelling IGP to execute committal and recovery orders — Whether IGP and police force should not be used to enforce private rights of mother — Whether IGP had discretion to refuse to execute High Court's orders on ground they were not in performance of public duties of police — Whether order of mandamus should be refused because wife had remedy of enforcing committal order against husband with assistance of court bailiff

The respondent and her husband were married under the Law Reform (Marriage and Divorce) Act 1976 ('the Law Reform Act'). The husband embraced Islam and also converted their three minor children and took away the youngest child ('Prasana Diksa'), then barely a year old, after obtaining a Shariah Court order granting him custody over the children. The High Court granted the respondent custody of the children under the Law Reform Act and ordered the husband to return Prasana Diksa to the respondent. On the husband's failure to comply with the order, the High Court found him in contempt and issued a warrant of committal and a committal order requiring the police to arrest him and convey him to prison. At the same time, the court issued a recovery order under s 53 of the Child Act 2001 directing the police to locate and take custody of Prasana Diksa. The orders for committal and recovery were served on the appellant ('the IGP'), but he refused to execute the same on the ground the police were in a dilemma, ie they were faced with two 'conflicting' orders — the Shariah Court's order granting custody of the child to the husband and the High Court's order granting the respondent custody. The IGP took the position that if he executed the High Court's orders he would be in contempt of the Shariah Court. The respondent applied to the High Court for judicial review of the IGP's decision and sought an order of mandamus to compel him to execute the committal and recovery orders. The High Court granted the application holding, inter alia, that the IGP's refusal to

execute the court's orders was a dereliction of his duty under the Police Act 1967; a challenge to the authority of the High Court rendering its orders ineffective and illusory; and that the IGP's stand that he would be liable for contempt of the Shariah Court was unreasonable and legally wrong as the Shariah Court did not have jurisdiction to grant the custody order. In the instant appeal, the IGP argued, inter alia, that the High Court was wrong in granting the order of mandamus because: (i) the dispute between the respondent and the husband was a private matter involving personal rights and did not concern public law; and (ii) the recovery order could not be justified under s 53 of the Child Act because the husband, having been granted custody by the Shariah Court, was a lawful guardian of the child under the Act.

Held, allowing the appeal:

(1) The general principle was that an order of mandamus would be issued to enforce a public duty at law for public good generally. Such an order, being discretionary, should not be readily issued when a party enforcing a private right had a remedy available to it — in this case, the committal order. The respondent was not without remedy if the order of mandamus was refused. The committal order was already there and the respondent could, with the assistance of the court bailiff, enforce the order against the husband to have him apprehended. Public policy militated against the use of public resources ie the IGP and the police force to enforce private rights when those rights did not affect the public at large. The exercise of discretion by the High Court in this case ought to be interfered with and the order of mandamus be discharged on the ground of public policy (see paras 28–31).

(2) The IGP had discretion in the matter when it came to execution of process to enforce a personal and private right as opposed to enforcement of public right. The duty and powers imposed on and given to the police under s 20(1) and (3)(f) of the Police Act 1967 must be read in the context of the general duty of the police to maintain law and order, preserve peace and security and prevent crimes under s 3(3) of the same Act. These were the public duties of the police. Enforcement of court processes involving private rights did not come within this scope of public duties (see para 36).

(3) The High Court had jurisdiction to grant the custody order to the respondent whose civil marriage to the husband remained valid and subsisting. The effect of s 51 of the Law Reform (Marriage and Divorce) Act 1976 was that she could apply to the civil court for custody, care and maintenance of the children even without filing for dissolution of the civil marriage. That being so, the issue of custody of children of a civil marriage where one party had converted to Islam was not within the exclusive jurisdiction of the Shariah Court. The Federal Court in

Subashini a/p Rajasingam v Saravanan a/l Thangathoray and other appeals [2008] 2 MLJ 147; [2008] 2 CLJ 1 had held that the civil High Court had exclusive jurisdiction on the dissolution of civil marriage and matters consequential or ancillary thereto including maintenance and custody of children. They were not within the Shariah Court's jurisdiction. It was held in that case that it was an abuse of process for the husband to file custody proceedings in the Shariah Court because the Shariah Court had no jurisdiction in the matter of custody of children of a non-Muslim marriage (see paras 26, 24, 25 & 27).

(4) (per **Tengku Maimun JCA**, dissenting) Whilst the present case commenced as a private dispute in a civil matter, the police were now thrust into the dispute by the application of the law. The involvement of the police did not relate purely to the rights of the father and the mother, but it related to the administration of justice as a whole. Mandamus lay to secure the performance of a public duty in which an applicant had sufficient legal interest. In granting the order of mandamus, the High Court had alluded to the duties of the police under the Police Act 1967 which included the apprehension and prosecution of offenders (see paras 57 & 62–63).

(5) (per **Tengku Maimun JCA**, dissenting) One of the general duties of the police under s 20(3)(f) of the Police Act 1967 was to execute summonses, subpoenas, warrants, commitments and other process lawfully issued by any competent authority. Flowing from that section, it was thus the statutory duty of the police to execute the warrant of committal and the recovery order issued by the High Court. The argument that the police ought not to intervene and that the parties should reconcile amongst themselves was not sustainable as it would render s 53(3)(d) of the Child Act otiose (see paras 58 & 61).

(6) (per **Tengku Maimun JCA**, dissenting) The IGP had a clear duty under the law to execute the warrant of committal to apprehend the father (who not only disobeyed the High Court order but had offended s 52 of the Child Act) and to give effect to the recovery order. The committal and recovery orders (which together with the custody order were valid orders issued by the High Court) were the final remedy available to the respondent to recover the child. There was no other avenue she could resort to (see paras 56 & 68).

(7) (per **Tengku Maimun JCA**, dissenting) As there was no order from the Shariah Court requiring the police to perform any act or duty as opposed to the warrant of committal and recovery order issued by the High Court and specifically directed to the police, the IGP had taken into account irrelevant considerations and had acted unreasonably in refusing to execute the said orders (see para 69).

[Bahasa Malaysia summary

Responden dan suaminya telah berkahwin di bawah Akta Membaharui Undang-Undang (Perkahwinan dan Perceraian) 1976 ('Akta Membaharui Undang-Undang'). Si suami telah memeluk agama Islam dan juga telah menukar agama tiga anak bawah umur mereka dan mengambil anak bongsu ('Prasana Diksa'), pada masa itu belum berumur setahun, selepas memperoleh perintah Mahkamah Syariah yang memberinya hak penjagaan ke atas kana-kanak itu. Mahkamah Tinggi memberikan responden hak penjagaan kanak-kanak di bawah Akta Membaharui Undang-Undang itu dan memerintahkan si suami mengembalikan Prasana Diksa kepada responden. Atas kegagalan si suami untuk mematuhi perintah itu, Mahkamah Tinggi mendapatinya menghina mahkamah dan mengeluarkan waran komital dan perintah komital menghendaki polis menangkapnya dan menghantarnye ke penjara. Pada masa yang sama, mahkamah telah mengeluarkan perintah pengembalian di bawah s 53 Akta Kanak-Kanak 2001 mengarahkan polis mencari dan mengambil hak jagaan Prasana Diksa. Perintah-perintah untuk komital dan pengembalian itu telah disampaikan ke atas perayu ('IGP'), tetapi dia enggan melaksanakan yang sama atas alasan pihak polis dalam keadaan dilema, iaitu mereka berhadapan dengan dua perintah yang 'conflicting' — perintah Mahkamah Syariah yang memberikan hak penjagaan kanak-kanak itu kepada suami dan perintah Mahkamah Tinggi yang memberikan responden hak penjagaan. IGP itu telah mengambil pendekatan bahawa jika dia melaksanakan perintah-perintah Mahkamah Tinggi dia akan menghina Mahkamah Syariah. Responden telah memohon kepada Mahkamah Tinggi untuk semakan kehakiman terhadap keputusan IGP dan memohon untuk perintah mandamus diberikan kepadanya bagi melaksanakan perintah-perintah komital dan pengembalian itu. Mahkamah Tinggi telah memberikan permohonan dengan memutuskan, antara lain, bahawa keengganan IGP untuk melaksanakan perintah-perintah mahkamah adalah pengabaian kewajipannya di bawah Akta Polis 1967; satu cabaran terhadap kuasa Mahkamah Tinggi mengakibatkan perintah-perintahnya tidak berkuat kuasa dan tidak selamat; dan bahawa pendirian IGP yang dia akan bertanggungjawab kerana menghina Mahkamah Syariah adalah tidak munasabah dan salah di sisi undang-undang kerana Mahkamah Syariah tidak mempunyai bidang kuasa untuk memberikan perintah hak penjagaan. Dalam rayuan ini, IGP berhujah, antara lain, bahawa Mahkamah Tinggi salah dalam memberikan perintah mandamus kerana: (i) pertikaian antara responden dan si suami adalah perkara peribadi yang melibatkan hak peribadi dan tidak melibatkan undang-undang awam; dan (ii) perintah pengembalian tidak boleh dijustifikasikan di bawah s 53 Akta Kanak-Kanak 2001 kerana suami, yang telah diberikan hak penjagaan oleh Mahkamah Syariah, adalah penjaga sah kanak-kanak itu di bawah Akta tersebut.

Diputuskan, membenarkan rayuan:

(1) Prinsip am adalah bahawa perintah mandamus akan dikeluarkan untuk menguatkuasakan kewajipan awam dari segi undang-undang demi kebaikan awam secara amnya. Perintah sebegitu, yang bersifat mengikut budi bicara, tidak patut dikeluarkan dengan mudah apabila satu pihak yang menguatkuasakan hak peribadi mempunyai remedi yang ada padanya — dalam kes ini, perintah komital. Responden bukan tiada remedi jika perintah mandamus ditolak. Perintah komital memang tersedia ada dan responden boleh, dengan bantuan bailif mahkamah, menguatkuasakan perintah itu terhadap si suami agar dia ditahan. Polisi awam menghalang penggunaan sumber awam, iaitu IGP dan pasukan polis untuk menguatkuasakan hak peribadi apabila hak tersebut tidak menjejaskan pihak awam secara umum. Penggunaan budi bicara oleh Mahkamah Tinggi dalam kes ini patut dicampur tangan dan perintah mandamus dilepaskan atas alasan polisi awam (lihat perenggan 28–31).

(2) IGP mempunyai budi bicara dalam perkara ini apabila tiba kepada pelaksanaan proses untuk menguatkuasakan hak peribadi dan persendirian yang bertentangan dengan penguatkuasaan hak awam. Kewajipan dan kuasa yang dikenakan ke atas dan diberikan kepada polis di bawah s 20(1) dan (3)(f) Akta Polis 1967 perlu dibaca dalam konteks kewajipan am polis untuk mengekalkan undang-undang dan ketenteraman, menjaga keamanan dan keselamatan dan menghalang jenayah di bawah s 3(3) Akta sama. Berikut adalah kewajipan awam polis. Penguatkuasaan proses-proses mahkamah yang melibatkan hak-hak persendirian tidak terangkum dalam skop kewajipan awam ini (lihat perenggan 36).

(3) Mahkamah Tinggi mempunyai bidang kuasa untuk memberikan perintah hak penjagaan kepada responden yang mana perkahwinan sivilnya kepada si suami masih sah dan wujud. Kesan s 51 Akta Membaharui Undang-Undang (Perkahwinan dan Perceraian) 1976 adalah bahawa dia boleh memohon kepada mahkamah sivil untuk hak penjagaan, penjagaan dan nafkah kanak-kanak meskipun tanpa memfailkan untuk pembubaran perkahwinan sivil. Jika begitu, isu hak penjagaan kanak-kanak dalam perkahwinan sivil yang mana satu pihak telah memeluk agama Islam bukan dalam bidang kuasa eksklusif Mahkamah Syariah. Mahkamah Persekutuan dalam kes *Subashini a/p Rajasingam v Saravanan a/l Thangathoray and other appeals* [2008] 2 MLJ 147; [2008] 2 CLJ 1 telah memutuskan bahawa Mahkamah Tinggi sivil mempunyai bidang kuasa eksklusif tentang pembubaran perkahwinan sivil dan perkara-perkara yang berbangkit dan bersampingan dengannya termasuk nafkah dan hak penjagaan kanak-kanak. Mereka bukan dalam bidang kuasa Mahkamah Syariah. Adalah diputuskan dalam kes tersebut bahawa ia adalah penyalahgunaan proses untuk si suami memfailkan prosiding hak penjagaan di Mahkamah Syariah kerana Mahkamah Syariah tiada bidang kuasa dalam perkara berhubung hak penjagaan

kanak-kanak daripada perkahwinan bukan secara Islam (lihat perenggan 25–27).

(4) (oleh **Tengku Maimun HMR**, menentang) Apabila kes ini dimulakan sebagai pertikaian persendirian dalam perkara sivil, polis kini berada dalam pertikaian melalui pemakaian undang-undang. Penglibatan polis tiada kaitan asal dengan hak bapa dan ibu, tetapi ia berkaitan pentadbiran keadilan secara keseluruhan. Mandamus digunakan untuk menjamin pelaksanaan kewajipan awam di mana pemohon mempunyai kepentingan undang-undang yang mencukupi. Dengan pemberian perintah mandamus, Mahkamah Tinggi telah merujuk kepada kewajipan polis di bawah Akta Polis 1967 yang mana termasuklah penahanan dan pendakwaan pesalah-pesalah (lihat perenggan 57 & 62–63).

(5) (oleh **Tengku Maimun HMR**, menentang) Salah satu kewajipan am polis di bawah s 20(3)(f) Akta Polis 1967 adalah untuk melaksanakan saman, sepina, waran, komitmen dan proses lain di sisi undang-undang yang dikeluarkan oleh mana-mana pihak berkuasa yang kompeten. Berikutan daripada seksyen tersebut, ia adalah kewajipan statutori polis untuk melaksanakan waran komital dan perintah pengembalian yang telah dikeluarkan oleh Mahkamah Tinggi. Hujah bahawa polis tidak patut campur tangan dan bahawa pihak-pihak patut berdamai antara mereka tidak boleh dikekalkan kerana ia akan menyebabkan s 53(3)(d) Akta Kanak-Kanak 2001 menjadi tak berguna (lihat perenggan 58 & 61).

(6) (oleh **Tengku Maimun HMR**, menentang) IGP mempunyai kewajipan yang jelas di bawah undang-undang untuk melaksanakan waran komital bagi menahan bapa (yang bukan sahaja tidak mematuhi perintah Mahkamah Tinggi tetapi telah melanggar s 42 Akta Kanak-Kanak 2001) dan untuk memberi kesan kepada perintah pengembalian. Perintah-perintah komital dan pengembalian (yang mana bersama dengan perintah hak penjagaan adalah perintah-perintah sah yang dikeluarkan oleh Mahkamah Tinggi) adalah remedi muktamad yang ada untuk responden mendapat balik kanak-kanak itu. Tiada cara lain untuknya berbuat demikian (lihat perenggan 56 & 68).

(7) (oleh **Tengku Maimun HMR**, menentang) Oleh kerana tiada perintah dari Mahkamah Syariah yang memerlukan polis melakukan apa-apa tindakan atau kewajipan yang bertentangan dengan waran komital dan perintah pengembalian yang dikeluarkan oleh Mahkamah Tinggi dan secara khusus diarahkan kepada pihak polis, IGP itu telah mengambil kira pertimbangan yang tidak relevan dan telah bertindak secara tidak munasabah dengan keengganan melaksanakan perintah-perintah tersebut (lihat perenggan 69).]

Notes

For cases on mandamus, see 2(3) *Mallal's Digest* (4th Ed, 2014 Reissue) paras 7375–7381.

Cases referred to

Hj Raimi bin Abdullah v Siti Hasnah Vangarama bt Abdullah and another appeal [2014] 3 MLJ 757, FC (folld)
Koon Hoi Chow v Pretam Singh [1972] 1 MLJ 180b (refd)
Minister of Finance, Government of Sabah v Petrojasa Sdn Bhd [2008] 4 MLJ 641, FC (refd)
Myriam v Mohamed Ariff [1971] 1 MLJ 265 (refd)
R Rama Chandran v The Industrial Court of Malaysia & Anor [1997] 1 MLJ 145, FC (refd)
R v Metropolitan Police Comr, ex p Blackburn [1968] 2 WLR 893, CA (distd)
Stepney Borough Council v John Walker & Sons Ltd [1934] AC 365, HL (refd)
Subashini a/p Rajasingam v Saravanan a/l Thangathoray and other appeals [2008] 2 MLJ 147; [2008] 2 CLJ 1, FC (refd)
Sukma Darmawan Sasmitaat Madja v Ketua Pengarah Penjara Malaysia & Anor [1999] 1 MLJ 266, CA (refd)
Syarikat Kenderaan Melayu Kelantan Bhd v Transport Workers' Union [1995] 2 MLJ 317; [1995] 2 CLJ 748, CA (refd)
Zainal Abidin bin Haji Abdul Rahman v Century Hotel Sdn Bhd [1982] 1 MLJ 260, FC (refd)

Legislation referred to

Child Act 2001 ss 52, 52(1), 53, 53(3)(d)
Courts of Judicature Act 1964 s 25(2), Schedule
Federal Constitution arts 121(1), 121(1A), Ninth Schedule, List II, State List
Guardianship of Infants Act 1961
Law Reform (Marriage and Divorce) Act 1976 s 51, 51(1), (2)
Police Act 1957 ss 3(3), 20(1), 20(3), (3)(f)

Appeal from: Application for Judicial Review No 25–13–06 of 2014 (High Court, Ipoh)

Suzana bt Atan (Shamsul Bolhassan with her) (Senior Federal Counsel, Attorney General's Chambers) for the appellant.
M Kula Segaran (Aston Paiva and Selvam Nadarajah with him) (Kula & Assoc) for the respondent.
Andrew Khoo Chin Hock watching brief for the Bar Council.
Philip Koh Tong Ngee watching brief for Majlis Perundingan Malaysia Agama Buddha, Kristian, Hindu, Sikh & Taoism.
Goh Siu Lin watching brief for Woman's Aid Organisation (Wao), Association of Women Lawyers (Awl), All Women's Actio Society, Perak Women For Women Society, Persatuan Kesedaran Komuniti Selangor (Empower), Persatuan

Sahabat Wanita Selangor, Sabah Women's Action-Resource Group (Sawo), Sisters In Islam (Sis), Tenaganita and Women's Centre For Change (WCC Penang).

Abdul Aziz Ab Rahim JCA (delivering judgment of the court):

[1] The respondent and one Pathmanathan were married according to the civil law marriage. They have three children. Subsequently, on 11 March 2009 Pathmanathan, the husband converted to Islam and became a Muslim. There was a tussle for the custody of the three children. Pathmanathan went to the Shariah High Court Ipoh and obtained an ex- parte interim custody order of all the three children on 8 April 2009 and obtained a permanent custody order on 29 September 2009. However, Pathmanathan, ('the husband') did not serve the Shariah order on the respondent and neither did he take any action to enforce the order. The Shariah High Court order contains an endorsement for compliance within 14 days of service of the order and non-compliance will amount to contempt of court.

[2] In the meantime, the respondent filed an application in the High Court Ipoh for custody of the three children under the provisions of Law Reform (Marriage and Divorce) Act 1976; and on 11 March 2010 the High Court at Ipoh granted the respondent the custody of the three children. Pathmanathan was a party (he was the respondent) to the application for custody before the High Court. The respondent served the order on Pathmanathan but the latter failed to comply with the order to surrender the three children to the respondent.

[3] We were informed by counsel for the respondent that the two eldest children had all the while, even at the time when the Shariah Court made the order for custody, were with the respondent. The only child that was with Pathmanathan at the material time and for the purpose of the appeal, is the youngest child (Prasana Diksa — Birth Certificate No B214511) of the three children that goes by her Muslim name of Umu Habibah ('Habibah'), who was taken away by Pathmanathan from the respondent without her consent on 31 March 2009. Because of the failure by Pathmanathan to hand over Habibah to the respondent, the latter applied to, and obtained from, the High Court at Ipoh a committal order against Pathmanathan for failure to comply with the High Court order of 11 March 2010. The committal order also contained a provision requiring the bailiff and a police officer to execute the order. At the same time, the respondent also obtained a recovery order under s 53 of the Child Act 2001 directed at the bailiff and a police officer to go to the premises of Pathmanathan to search and take custody of Habibah. Pathmanathan was also represented at the hearing of the recovery order.

[4] However, no action was taken by the police to execute the two orders namely, the committal order and the recovery order which were both dated 30 May 2012.

[5] It appears from the fact of the case that the Inspector General of Police ('the IGP') had publicly made a statement (which were widely reported in the printed media in the country) that the police will not take any action to arrest Pathmanathan or to secure the custody of Habibah because of the IGP's perception that there were two conflicting orders as to the custody of the children — the first order was by the Shariah High Court Ipoh dated 29 September 2009 ('the Shariah order') and the second order was by the High Court at Ipoh dated 11 March 2010 ('the High Court order').

[6] Consequently, the respondent applied to the High Court at Ipoh for a judicial review for an order of mandamus to be issued and directed at the IGP commanding the IGP to execute the two High Court orders namely, the recovery order and the committal order.

[7] This is an appeal by the IGP against that order of mandamus issued by the High Court at Ipoh. The sole issue for our determination is whether the order of mandamus was correctly issued and whether the learned High Court judge had judiciously and properly exercised his discretion in making the order, an order of mandamus being a prerogative order.

[8] It is trite law that an order of mandamus is issued whenever there is a public duty imposed in law on a person or body and the purpose of the order is to compel that person or body to carry out the duty required by law to be performed by him or by it.

[9] At this juncture and before we discuss the merit of the appeal, we will take note of the following facts which are not in dispute: (a) Pathmanathan, the husband, was represented and participated in the application for custody by the respondent in the High Court at Ipoh; (b) in that same proceedings the issue of the existence of the Shariah order was raised and canvassed; (c) Pathmanathan appealed against that order to the Court of Appeal but the appeal was struck off on technicality, in that Pathmanathan as the appellant had failed to file any appeal record for the appeal; (d) Pathmanathan also filed an appeal against the committal and the recovery orders but again the appeal was dismissed on technical ground for the same reason that the appellant/Pathmanathan had failed to file any appeal record for the appeal; (e) the IGP had filed an application to intervene in the appeal as to the committal and recovery orders; but because the main appeal by Pathmanathan was struck off, the IGP's application to intervene accordingly falls; (f) the Shariah order does have an endorsement but does not contain any direction to the bailiff or a police officer

to effect enforcement whereas the High Court orders contained that direction. A

[10] Now, we address the submissions by counsel in this appeal. The learned senior federal counsel Encik Nor Hisham argued that the order of mandamus was bad because it was impossible to be enforced due to the presence of two conflicting custody orders ie the Shariah order and the High Court order. He submitted that the learned High Court judge in granting the custody order on 11 March 2010 had committed a serious error of law in that the learned High Court judge had ruled that the Shariah order was invalid and therefore irrelevant for consideration in deciding the application for custody by the respondent. Impliedly therefore the learned senior federal counsel submitted that because the learned High Court judge had erroneously held that the Shariah order was invalid, therefore the exercise of discretion to order the issuance of order of mandamus was wrong. B C D

[11] Secondly, the learned senior federal counsel also submitted that the matter before us arises from a private dispute between the parties namely, the wife (ie the respondent) and Pathmanathan (the husband) as to the custody of the three children out of their civil marriage. It was further submitted that though the IGP was not able to challenge the granting of the recovery order and the committal order because the appeal by Pathmanathan ie the husband was struck off on technicality, the appellant (ie the IGP) in this appeal can still challenge that validity of the order of mandamus in a collateral attack against the custody order by the High Court on two grounds. First, that the recovery order was made beyond the scope of s 53 of the Child Act 2001 and secondly the existence of the Shariah order which is an order by a court of competent jurisdiction. E F

[12] For the respondent it was submitted that firstly, there was no conflicting court orders. The Shariah Court is not a court of parallel jurisdiction with the civil High Court; but a court of exclusive jurisdiction in that its jurisdiction is exclusively applicable to Muslim and practicing the precepts of Islam. The civil High Court jurisdiction however covers all — Muslim and non-Muslim — except when it comes to matters relating to the practice and teaching of Islam. Secondly, it was submitted that the children in this case are children begotten out of a civil marriage between two non-Muslims under the civil Law Reform (Marriage and Divorce) Act of 1976 and therefore any issue as to the custody of the children can be dealt with by the civil High Court. Thirdly, the respondent being a non-Muslim cannot go to the Shariah Court to get custody of the children because the Shariah Court has no jurisdiction over her. The respondent however can go to the civil High Court for custody of her children from the marriage with Pathmanathan. Though Pathmanathan had embraced Islam and is now a Muslim, it does not prevent him from submitting to the jurisdiction of the civil High Court. In fact the civil High Court always has G H I

jurisdiction over him on the matter because the children were the children of civil marriage. On the contrary, the respondent, being non-Muslim has no obligation to submit herself to the Shariah Court jurisdiction for the purpose of obtaining the custody of her children. It was submitted before us that even if the respondent were to agree to submit herself to jurisdiction of the Shariah Court, in law the consent of party does not confer jurisdiction on the Shariah Court to try the matter when the Shariah Court does not have the jurisdiction in the first place. Fourthly, if the order of mandamus is not granted the respondent, being a non-Muslim, will have no remedy in so far as it relates to the custody of her children and that she as a mother will forever be condemned to never see her children again (in this case her daughter Habibah). The non-granting of the order of mandamus would also mean that the recalcitrant ex-husband (Pathmanathan) will remain in contempt of court and continue to commit an offence under s 52(1) of the Child Act 2001.

OUR OPINION

[13] It is pertinent to take note that in this appeal all parties agreed that on principle an order of mandamus can be issued against the IGP in an appropriate case and with proper exercise of the judicial discretion by the court. Nevertheless, we would reiterate that the civil High Court had the powers to grant prerogative writs including a writ of mandamus. This is provided for under sub-s 25(2) of the Courts of Judicature Act 1964 in relation to additional powers of the High Court. This provision had been interpreted by the Federal Court in the case of *Minister of Finance, Government of Sabah v Petrojasa Sdn Bhd* [2008] 4 MLJ 641 as well as in other cases by the apex court: *Zainal Abidin bin Haji Abdul Rahman v Century Hotel Sdn Bhd* [1982] 1 MLJ 260, *R Rama Chandran v The Industrial Court of Malaysia & Anor* [1997] 1 MLJ 145. The gist of these decisions by the apex court is that the civil court may resort to the additional powers given to it under the Schedule to the Courts of Judicature Act 1964 to found the necessary jurisdiction and to issue appropriate orders in the appropriate case in order to do justice. In the case of *Stepney Borough Council v John Walker & Sons Ltd* [1934] AC 365 at p 395, it was said that the order of mandamus 'was introduced to prevent disorder from a failure of justice and defect of police; and that it ought to be used upon all occasions where the law had established no specific remedy, and where in justice and good governance that ought to be one'. In *R v Metropolitan Police Comr, ex p Blackburn* [1968] 2 WLR 893, the English Court of Appeal as a matter of principle agreed that a mandamus can be issued to the commissioner of police to reverse his policy decision of not prosecuting gaming clubs for breaking gaming laws. Salmon L J, one of the Law Lords who delivered the judgment in that case said that 'the police owe the public a clear legal duty to enforce the law' and that 'in the extremely unlikely event of the police failing or refusing to carry out their duty, the Court would not be powerless to intervene'.

[14] Section 20(1) and (3) of the Police Act 1967 ('the Act') read together with s 3(3) of the Act empowers and imposes a duty on a police officer to maintain law and order and to apprehend and prosecute offenders. And under s 20(3)(f) of the Act, a police officer is under a duty to execute summonses, subpoenas, warrants, commitments and other process lawfully issued by any competent authority. For ease of reference the relevant provisions of the Police Act are reproduce below:

Section 3(3):

> (3) The Force shall subject to this Act be employed in and throughout Malaysia (including the territorial waters thereof) for the maintenance of law and order, the preservation of the peace and security of Malaysia, the prevention and detection of crime, the apprehension and prosecution of offenders and the collection of security intelligence.

Section 20(1) and (3) and sub-s (3)(f):

> (1) Every police officer shall perform such duties and exercise such powers as are by law imposed or conferred upon a police officer, and shall obey all lawful directions in respect of the execution of his office which he may from time to time receive from his superior officers in the Force.
>
> ...
>
> (3) Without prejudice to the generality of the foregoing provisions or any other law, it shall be the duty of a police officer to carry out the purposes mentioned in section 3(3); and he may take such lawful measures and do such lawful acts as may be necessary in connection therewith, including —
>
> (a) ...
>
> (b) ...
>
> (c) ...
>
> (d) ...
>
> (e) ...
>
> (f) executing summonses, subpoenas, warrants, commitments and other process lawfully issued by any competent authority.

[15] Reading the above provisions we have no doubt in our mind that the IGP being the officer in charge of the police and its most superior commander may be directed by a competent authority to carry out the duty impose on a police under his command as envisaged under the Police Act, in particular the above provisions which we have referred to. In law therefore, where there is a legal public duty to do an act by an authority, then an order of mandamus may be issued against that authority to carry out that public duty if such authority has refused to do so.

[16] However, the appellant in this appeal had mounted a collateral attack against the High Court orders to justify its claim that the order of mandamus in this case was issued on a wrong exercise of discretion. The appellant argued that the High Court should not have issued the order of mandamus to enforce the High Court order on custody and recovery of the children because there is a valid Shariah order granted to Pathmanathan and that by granting the order of mandamus to the respondent, the High Court had placed the IGP in a dilemma. The appellant argued that the Shariah order and the High Court order are in conflict with each other. Is that so?

[17] To resolve the perceived or purported conflict between the Shariah order and the High Court orders, we have to take a step back and examine the jurisdiction of the Shariah Court and the civil High Court.

[18] The starting point is art 121(1A) of the Federal Constitution. That article provides that the High Courts (one in Malaya and one Sabah and Sarawak) which were established pursuant to art 121(1) of the Constitution shall not have jurisdiction in respect of any matter within the jurisdiction of the Shariah Court. Mr Phillip Koh, who was watching brief for Malaysian Consultative Council for Buddhism, Christianity, Hinduism, Sikhism and Taoism when invited to address the court on the point of jurisdiction as amicus curiae informed the court that art 121(1A) was introduced into the Constitution to overcome the problem of conflicting decision between the Shariah Court and the High Court in the case of *Myriam v Mohamed Ariff* [1971] 1 MLJ 265. That case also involved custody of children. The husband in that case had obtained by consent from the Kathi Court the custody of the children of their Islamic marriage. Later the wife filed another application for custody of the children in the High Court. The High Court in that case granted the custody to the wife. Both parties in that case were Muslims. So there were two conflicting orders for custody of the children involving two Muslims in Islamic marriage. Thus following the amendment to the constitution and the insertion of art 121(1A) the civil High Court does not have jurisdiction to deal with matters that fall within the jurisdiction of the Shariah Court. In this regard Mr Phillip Koh informed the court that matters that come within the jurisdiction of Shariah are listed in the Ninth Schedule — List II — The State List of the Constitution. Among the matters listed are: matters on Islamic law and personal and family law of persons professing the religion of Islam, including the Islamic law relating to succession, testate and intestate, betrothal, marriage, divorce, dower, maintenance, adoption, legitimacy and guardianship. However one must bear in mind that the jurisdiction on these matters conferred on the Shariah Court are only applicable to Muslims. In other words the jurisdiction of the Shariah on these matters does not extend to non-Muslim. This principle has been decided by high authorities and our law reports are replete with cases on point.

[19] We observe in the State list — List II — Ninth Schedule to the Constitution, the matter of custody of children is not expressly stated. One however may argue that matters on marriage, divorce and guardianship mentioned in the List are wide enough to include matters as to custody of children because there are closely linked. We can accept that. But are they exclusively within the jurisdiction of the Shariah Court? There are provisions in the Guardianship of Infants Act 1961 and the Law Reform (Marriage and Divorce) Act of 1976 that govern issues as to custody of children out of valid marriage though applicable only to non-Muslim.

[20] In *Hj Raimi bin Abdullah v Siti Hasnah Vangarama bt Abdullah and another appeal* [2014] 3 MLJ 757, the Federal Court speaking through the judgment of Arifin Zakaria Chief Justice in construing the scope of art 121(1A) of the Constitution did not disapprove the view expressed by the Court of Appeal in that case that:

> In our view the correct position in law is that only if the subject matter of the action is exclusively within the jurisdiction of the Shariah Courts would the subject matter, by virtue of art 121(1A) of the Federal Constitution, fall outside the jurisdiction of the civil court — p 767 of the report.

[21] The Federal Court also quoted with approval the following passage from the judgment of the Court of Appeal in *Sukma Darmawan Sasmitaat Madja v Ketua Pengarah Penjara Malaysia & Anor* [1999] 1 MLJ 266:

> Article 121(1A) of the Federal Constitution does not exclude the jurisdiction of the ordinary courts over all matters — including offences under the PC committed by Muslims — which are also within the jurisdiction of the Shariah Court. It only removes the jurisdiction of the ordinary courts over those matters which are within the exclusive jurisdiction of the Shariah Court. The intention of the Legislature, as could be discerned from *Hansard*, was to prevent the High Court from exercising judicial review over the decision of the Shariah Court.

[22] The emphasis is on the phrase 'exclusive jurisdiction'; and the Federal Court also did not reject the view by the Court of Appeal that the burden is on the person (who wants the Shariah Court or the High Court to make an order in his or her favour) to satisfy the court that the subject matter of the action is such that it comes exclusively within the jurisdiction of the Shariah Court. In *Hj Raimi*'s case, the respondent's (the plaintiff) father had converted to Islam together with his wife and five children including the plaintiff who at the time of conversion was an infant in 1983. 16 years later in 2009 the plaintiff commenced an action against the defendants in the High Court in Penang, inter alia, for declarations and orders that the defendants had wrongfully and unlawfully subjected the plaintiff to undergo a religious conversion process at the age of seven years old. The defendants in that case filed an application to strike out the plaintiff's action but on appeal to the Court of Appeal by the

plaintiff in that case, the appeal was allowed. The Court of Appeal directed that the plaintiff's originating summons be converted to writ and the matter be reverted to High Court Penang to be tried on the issue whether the subject matter of the plaintiff's action fell within the exclusive jurisdiction of the Penang Shariah High Court. The defendant appealed against that decision to the Federal Court and the latter allowed the appeal, ruling that the Shariah Court have exclusive jurisdiction to determine whether a person is a Muslim or not. That is, the matter is exclusively within the jurisdiction of the Shariah Court as envisaged in the State List — List II — Ninth Schedule of the Federal Constitution.

[23] Applying the above principle, we are of the view that it is for Pathmanathan (the husband and respondent before the High Court in the custody proceedings filed by the respondent here) to show to the High Court that the issue of custody is within the exclusive jurisdiction of the Shariah Court and that the civil High Court could not and should not make any order on the custody of the children as that would be in conflict with the already existing order obtained by Pathmanathan (the husband and the father) from the Shariah High Court. The High Court that granted the custody order to the respondent apparently did not agree with Pathmanathan. We think the learned judge is correct. In matters of custody involving non-Muslim married couple whose marriage was dissolved on ground of conversion to Islam, the Shariah Court does not have exclusive jurisdiction. At this point we wish to state that from the Islamic point of view if one of the spouse of the marriage embraces Islam the marriage is automatically dissolved. This is because Islam forbids a Muslim to marry a non-Muslim unless the non-Muslim first be converted to Islam except where, if the non-Muslim is a woman, the woman is *ahlil kitab*. But from the civil marriage point of view, the conversion to Islam does not automatically dissolve the civil marriage registered under the Law Reform (Marriage And Divorce) Act of 1976. The dissolution of the civil marriage may be dissolved only on a petition for divorce in the civil court by the spouse that has not converted to Islam. This position is clear from the reading of s 51(1) of the Law Reform (Marriage and Divorce) Act 1976 which provides as follows:

> 51(1) Where one party to a marriage has converted to Islam, the other party who has not so converted may petition for divorce.

[24] Thus there is no automatic or immediate dissolution of the civil marriage upon conversion to Islam. It is also pertinent to look at s 51(2) of the Law Reform (Marriage and Divorce) Act 1976 which reads:

> The court upon dissolving the marriage may make provision for the wife or husband, and for the support, care and custody of the children of marriage, if any, and may attach any conditions to the decree of the dissolution as it thinks fit.

In our present case, there is no petition for dissolution of marriage by the respondent on the ground that Pathmanathan had converted to Islam. Therefore, in so far as the respondent is concerned her civil marriage to Pathmanathan is still a valid marriage and still subsists.

[25] In our view, the effect of s 51 of the Law Reform (Marriage And Divorce) Act 1976 is that a non-Muslim wife who has not converted to Islam, may upon the husband's conversion apply to the civil court for custody, care and maintenance of the children even without filing for the dissolution of the civil marriage. That being the case the issue of custody of children of a civil marriage where one party has converted to Islam is not within the exclusive jurisdiction of the Shariah Court. The non-Muslim party to the civil marriage may file an application in the civil court for the custody of the children and the civil court in appropriate cases may grant the custody order.

[26] We therefore conclude that the High Court has jurisdiction to grant the custody order in this case. As authority to support our conclusion on this point we refer to the Federal Court decision in *Subashini a/p Rajasingam v Saravanan a/l Thangathoray and other appeals* [2008] 2 MLJ 147; [2008] 2 CLJ 1.

[27] However, in this appeal we are not asked to decide whether the High Court orders were valid or otherwise or that the Shariah order was null and void. That had been done by the High Court when it granted the order of custody and recovery to the respondent. These issues are raised by the appellant as a side wind to challenge the order of mandamus issued by the High Court. They are raised not for our decision. To put the issues to rest, we need only to cite the Federal Court decision in *Subashini a/p Rajasingam* where it was held that the civil High Court has exclusive jurisdiction on the dissolution of civil marriage and matters consequential or ancillary thereto, including maintenance, custody of children and other ancillary matters. They are not within the Shariah Court jurisdiction. Hence, it was held in that case that it was an abuse of process for the husband to file custody proceedings in the Shariah Court in respect of the children because the Shariah Court have no jurisdiction in the matter of custody of children of non-Muslim marriage.

[28] The principal question however, is whether the order of mandamus ought to be given in this case. We recapitulate that on 30 May 2014 the learned Justice Lee Swee Seng of the High Court at Ipoh had found the husband Pathmanathan guilty of contempt of the two High Court orders — the custody and the recovery order and had passed sentence of imprisonment until the contemnor ie the husband Pathmanathan has purged his contempt. Counsel for Pathmanathan then had applied for the stay of the committal order but was refused. The respondent now can enforce the order with the assistance of the court bailiff to have the contemnor apprehended.

[29] In this respect, the learned senior federal counsel for the appellant submitted that the dispute is between two private parties; and what is involved in the dispute is, a private and personal right of one party over the other. Therefore, we think that public policy militates against the use of public resources ie the IGP and the police force to enforce the private rights as opposed a public rights when the private rights do not affect the public at large.

[30] The general principle is that an order of mandamus will be issued to enforce a public duty at law for public good generally. Of course here, one may argue that if the order of mandamus is refused, the respondent is without remedy and that the husband Pathmanathan may just ignore the High Court order with impunity. However we think that even if the order of mandamus is refused the respondent is not without remedy. The committal order is already there; and the respondent could with the assistance of the court bailiff execute the order against the husband.

[31] An order of mandamus being a discretionary order should not be readily issued when the parties in enforcing a private rights, has a remedy available to it — in this case the committal order.

[32] In *Koon Hoi Chow v Pretam Singh* [1972] 1 MLJ 180b, the applicant for a mandamus order was the defendant in a Civil Suit No 168 of 1971 at Ipoh High Court which is a suit where the plaintiff claim for damages arising from an accident involving an infant. The applicant had applied to the surgeon who was the respondent in the application for detail of injuries found on the infant and the treatment given at the hospital after the request for the information was not comply with by the respondent's surgeon. The respondent in the applicant was the doctor who attended to the infant and had ordered the imputation of the infant's leg above the knee. This application was made pursuant to s 44 of the Specific Relief Ordinance 1950. In the application the applicant alleged that the injuries which the infant actually received were not such that should have necessitated the amputation of the leg provided proper care was exercised by the respondent in charge at the Ipoh Hospital, the inference being that it was the negligence of the respondent which aggravated the injuries. In *Koon Hoi Chow*, the learned Sharma J said that 'for the applicant to succeed in bringing his case within the purview of section 44 of the Specific Relief Ordinance, the applicant must show a personal rights which would be injured or defeated if the order is not made'. In that case learned counsel for the applicant conceded that the personal rights of the applicant was in truth and substance the right to effectively defend the civil suit. The learned judge held that view that such rights is against the plaintiff in the suit and not against the respondent in the application.

[33] It is also pertinent to note that in *Koon Hoi Chow* the learned judge also

remarked that mandamus does not lie to enforce a civil liability arising out of a contract or to enforce rights based on contract and also that mandamus does not issue to enforce a civil liability under torts. But more importantly the learned judge said that 'the applicant must show not only that he has a legal right to have the act performed but that the right is so clear and well defined as to be free from any reasonable controversy. The order cannot issue when the right is doubtful, or is a qualified one or where it depends upon an issue of fact to be determined by the respondent'.

[34] In *ex p Blackburn* a private citizen had applied to the court for, inter alia, an order of mandamus directing the respondent to reverse a policy decision. The policy decision was that the respondent as Commissioner of Police of Metropolis will not allow an insight observation in license or registered club for the purpose of detecting gaming without first obtaining his covering approval. In that case Lord Denning MR said that 'mandamus is a very wide remedy which has always been available against public officers to see that they do their public duty'. However, the learned Law Lord also said that 'the parties who apply for mandamus must show that he has sufficient interest to be protected and there is no other equally convenient remedy'. Once it is shown the remedy of mandamus is available even against the Commissioner of Police of Metropolis. In his judgment Lord Denning MR had stated that 'it is an open question whether Mr Blackburn has a sufficient interest to be protected'. His Lordship went further to say that 'no doubt any person who was adversely affected by the action of the commissioner in making a mistaken a policy decision would have such interest'. The difficulty is, according to the His Lordship is to see how Mr Blackburn himself has been affected. That question was left open and unanswered. But His Lordship went on to hold that 'the policy was unfortunate'. In our view the facts and circumstances in the *ex p Blackburn* are very different from the present appeal. In that case it involved the question of enforcing a law on gaming and it would be in the public interest for the police commissioner to put gaming under control according to the provision of the law. But what we want to emphasise is that *ex p Blackburn* may be cited as an authority to show that an applicant for an order of mandamus must show sufficient public interest that goes beyond the applicant's personal or private interest. The other Law Lord in that case, the learned Edmund Davies LJ said as follows:

> It was further urged that, assuming jurisdiction in this court and even assuming that the respondent is under the duty which this court now unanimously holds he does own, nevertheless the applicant should be denied the relief sought inasmuch as it is open to him to lay an information or apply for a voluntary bill of indictment. The law is, as I believe, that relief by way of a prerogative order will not be granted if there is available any other legal remedy, equally convenient, beneficial and appropriate.

In this respect, and as we have said earlier, the respondent has the remedy of executing the committal order granted by the High Court.

[35] With regard to the approach that the court should take in dealing with an application for mandamus, we can do no better than to quote from a passage by Lord Wright in the House of Lords's case of *Stepney Borough Council v John Walker & Sons Ltd* at p 395:

> I do not wish in any way to detract from the seriousness of the duties with which the Court is charged in dealing with an application for a writ of mandamus, or the importance of the Court giving the most liberal consideration in the interests of the applicant. In the words of Lord Mansfield in *Rex v Barker* (1), 'A mandamus is a prerogative writ; to the aid of which the subject is entitled, upon a proper case previously shown, to the satisfaction of the court. The original nature of the writ, and the end for which it was framed, direct upon what occasions it should be used. It was introduced, to prevent disorder from a failure of justice, and defect of police. Therefore it ought to be used upon all occasions where the law has established no specific remedy, and where in justice and good government there ought to be one. Within the last century, it has been liberally interposed for the benefit of the subject and advancement of injustice.' More compendiously it was said by Bowen LJ in *In re Nathan* (2) 'If, therefore, there is no other means of obtaining justice, the writ of mandamus is granted to enable justice to be done.' Thus the judges have a wide discretion in exercising this remedial jurisdiction; but it is to be exercised as a judicial discretion. There are in the books a vast number of cases illustrating the rules which govern the exercise of this power. Some of these cases are difficult to reconcile with others. I shall merely seek by a few citations to justify the principles which I think should govern this case.

[36] We are also of the view that IGP has a discretion in the matter when it comes to execution of process to enforce a personal and private right as oppose to enforcement of public right. In our view the duty and powers imposed on and given to the police under s 20(1) and (3)(f) of the Police Act 1957 must be read in the context of the general duty of the police to maintain law and order and preservation of peace and security of Malaysia and prevention of crimes under s 3(3) of the same Act. These are the public duties of the police. Enforcement of court processes involving private rights does not come within this scope of public duties.

[37] On the above reasoning and in the light of the facts and circumstances of this case, we are of the view that the exercise of discretion by the learned judge ought to be interfered with and the order of mandamus be discharged on the ground of public policy.

[38] My learned brother Justice Ahmadi had read this judgment in draft and had agreed with it. But my learned sister Justice Tengku Maimun is dissenting. Accordingly, by majority we allow the appeal. In view of the fact that this is a case of public interest we make no order as to cost.

Tengku Maimun JCA (dissenting):

[39] This court, by a majority decision had allowed the appeal of the Inspector General of Police ('the IGP') against an order of mandamus issued by the High Court. I dissented. I now give the reasons for my dissenting judgment.

BACKGROUND FACTS

[40] The respondent and one Pathmanathan were married under the Law Reform (Marriage and Divorce) Act 1976 ('the Law Reform Act'). They have three children.

[41] In 2009, Pathmanathan ('the father') converted into Islam. The three children; Tevi Darsiny, Karan Dinish and Prasana Diksa who were 12 years, 11 years and one year old respectively were converted by the father as well. The father obtained a custody order for all the three children from the Shariah Court. For obvious reason, that the Shariah Court has no jurisdiction over the non-Muslim respondent ('the mother'), the mother was not made a party to the proceedings in the Shariah Court.

[42] In 2010, the mother filed an application in the High Court Ipoh for custody of the three children under the Law Reform Act. The High Court granted the mother the custody of the three children, who at all material time, were with the mother (except the youngest daughter, Prasana Diksa). Prasana Diksa ('the child') was barely a year old and was still breast feeding when she was forcibly taken away from the mother in March 2009. The High Court ordered the father to deliver the child to the mother immediately. The father refused to comply with the High Court order.

[43] The father had filed an appeal against the custody order but he failed to diligently pursue his appeal, resulting in the appeal being struck out by the Court of Appeal.

[44] Upon the father's failure to comply with the custody order, the High Court found him to be in contempt and committed him to prison. A warrant of committal, commanding every police officer to apprehend the father and convey him to prison was issued by the High Court. A recovery order under the Child Act 2001 was also issued by the High Court. The recovery order specifically directed the police to investigate and determine the whereabouts of the father and the child and to obtain custody of the child from any place where she may be found. Insofar as the recovery order is concerned, it must be noted that no affidavit was filed by the father to oppose the mother's application.

[45] The father had also appealed against the committal and recovery orders, which appeal had similarly been struck out by the Court of Appeal. Consequent to the striking out of the appeal, the attorney general's application to intervene on his own behalf and on behalf of the IGP in the proceedings in the Court of Appeal was rendered academic.

[46] The warrant, the order for committal and the recovery order were served on the IGP. The solicitors for the mother had written several letters to the IGP on the orders. The IGP refused to execute the warrant of committal and the recovery order on the ground that the police have been put in a quandary as they are faced with two conflicting court orders, ie the Shariah Court order granting custody to the father and the High Court order granting custody to the mother. The IGP took the position that to execute the custody order of the High Court would cause him to be in contempt of the Shariah Court.

[47] Unable to trace and be reunited with the child, the mother filed an application in the High Court for judicial review, for a mandamus to be issued to compel the IGP to execute both the warrant of committal and the recovery order. The application was granted by the High Court.

THE APPEAL

[48] In challenging the High Court's decision, the learned senior federal counsel ('the SFC') repeated the stand that the IGP is unable to enforce the committal order and the recovery order because at the same time, the Shariah Court custody order is still in force which entitles the father to custody of the three children including the child.

[49] The learned SFC had also submitted that:

(a) under art 121(1A) of the Federal Constitution, Shariah Court and civil High Court are courts of equal standing with its own exclusive jurisdiction which one may not encroach into another;

(b) the mandamus order was erroneous and the exercise of discretion by the learned High Court judge was tainted with illegality. In this respect the complaint of the learned SFC was on the finding of the High Court that (p 24: *rekod rayuan tambahan perayu* 2): 'This Court had held that the custody order of the Shariah Court is null and void and of no effect and the Shariah Court had no jurisdiction over the granting of the said custody order.';

(c) this is a dispute between private parties which does not concern public law issue where parties should have reconciled between themselves; and

(d) under s 52 of the Child Act 2001, the father is also considered a lawful guardian of the child.

[50] To reiterate, the issue before the Court of Appeal is whether the order of mandamus was correctly granted by the High Court. The correctness of the decision of the High Court on the custody order, the committal order and the recovery order is no longer an issue after the father's appeal was struck out.

[51] Coming back to the points raised on art 121(1A) of the Federal Constitution; on the finding by the High Court that the Shariah Court order was null and void and that the Shariah Court has no jurisdiction to grant the custody order and on the point that the father is also the lawful guardian of the child, the answer is found in the case of *Subashini a/p Rajasingam v Saravanan a/l Thangathoray and other appeals* [2008] 2 MLJ 147; [2008] 2 CLJ 1, where the facts are very much similar to the present case.

[52] In *Subashini*, the parties were originally Hindus and were married pursuant to a civil ceremony of marriage registered under the Law Reform Act. There were two children of the marriage, both boys. The husband converted himself and the elder son, aged four at the material time, to Islam. An interim custody order was granted by the Shariah Court in respect of the converted son to the husband. After the husband's conversion and knowing that the husband had taken proceedings in the Shariah Court, the wife filed a petition for the dissolution of marriage pursuant to s 51 of the Law Reform Act, coupled with an application for custody and ancillary reliefs.

[53] *Subashini*'s case went up to the Federal Court. Among the questions posed for determination by the Federal Court was:

> In situations where one spouse in a marriage under the Law Reform (Marriage and Divorce) Act 1976 (a 'Law Reform Marriage') converts to Islam and the other does not, does the High Court or Shariah Court have exclusive jurisdiction to grant decrees of divorce of such Law Reform Marriages and to make all other orders in respect of the division of matrimonial assets, the maintenance of spouse and of the children of the Law Reform Marriage ('children of the Law Reform Marriage'), the custody, care and control of the children of the Law Reform Marriage and all other matters incidental thereto.

[54] The Federal Court, speaking through Nik Hashim FCJ said at p 167 (MLJ); p 28 (CLJ) of the report:

> [15] ... my view is that the High Court would have the jurisdiction to hear and determine the petition for divorce and the application for ancillary reliefs under s 51 of the 1976 Act even though the husband had converted to Islam before her petition for divorce had been filed in the High Court and that he had already commenced the proceedings in the Shariah Court. ...

[55] The learned FCJ further said at pp 168–169 (MLJ); p 31 (CLJ):

> [19] ... The husband could not shield himself behind the freedom of religion clause under art 11(1) of the FC to avoid his antecedent obligations under the 1976 Act on the ground that the civil court has no jurisdiction over him. It must be noted that both the husband and wife were Hindus at the time of their marriage. Therefore the status of the husband and the wife at the time of registering their marriage was of material importance, otherwise the husband's conversion would cause injustice to the unconverted wife including the children. A non-Muslim marriage does not automatically dissolve upon one of the parties converted to Islam. Thus by contracting the civil marriage, the husband and wife were bound by the 1976 Act in respect to divorce and custody of the children of the marriage, and thus, the civil court continues to have jurisdiction over him, notwithstanding his conversion to Islam.

[56] By the above judgment, it is now settled that the civil High Court is the court having jurisdiction to deal with the custody of the child born out of a civil marriage. The custody order issued by the High Court is thus a valid order. The committal order and the recovery order which emanate from the custody order are similarly valid orders. The mother has the lawful custody of the child. And this position of the law does not in any way change the position of the Shariah Court and the civil High Court under art 121(1A) of the Federal Constitution.

[57] With regards the third point raised by the learned SFC, my views are as follows. Whilst the present case commence as a private dispute in a civil matter, the police is now thrust into the dispute by the application of the law. The involvement of the police does not relate purely to the rights of the father and the mother, but it relates to the administration of justice as a whole.

[58] One of the general duties of the police as provided under s 20(3)(f) of the Police Act 1967 is to execute summonses, subpoenas, warrants, commitments and other process lawfully issued by any competent authority. Flowing from s 20(3)(f), it is thus the statutory duty of the police to execute the warrant of committal and the recovery order issued by the High Court. Indeed, it is not the IGP's position that it is not the duty of the police to execute the warrant of committal and the recovery order or that it is the discretion of the police whether or not to execute the said orders. Neither did the IGP assert that the mother had not at any time approached the police for assistance before filing the application for judicial review. The challenge by the IGP is premised on the existence of the Shariah Court order and that the recovery order is beyond the scope of s 53 of the Child Act, as the father is also considered the lawful guardian.

[59] Parliament in its wisdom had enacted ss 52 and 53 of the Child Act. Section 52(1) provides:

(1) Any parent or guardian who — A

(a) does not have the lawful custody of a child; and

(b) takes or sends out a child, whether within or outside Malaysia,

without the consent of the person who has the lawful custody of the child commits an offence and shall on conviction be liable to a fine not exceeding ten thousand ringgit or to imprisonment for a term not exceeding five years or to both. B

[60] Section 53 provides for recovery order and it states:

53(1) If it appears to the Court that there is reason to believe that a child had been taken or sent away without the consent of the person who has lawful custody of the child ... the Court may make a recovery order. C

(2) A recovery order may be made by the Court on application being made by or on behalf of any person who has the lawful custody of the child.

(3) For the purposes of this section, a 'recovery order' may — D

(a) ...

(b) ...

(c) ... E

(d) authorize any police officer to enter into any premises specified in the order and search for the child, using reasonable force if necessary.

[61] The argument that the police ought not to intervene and that the parties should reconcile among themselves, in my view, is not sustainable as it will render the provision in s 53(3)(d) of the Child Act otiose. F

[62] The law relating to the granting of an order of mandamus is settled. Mandamus lies to secure the performance of a public duty in which an applicant has sufficient legal interest to the performance. In *Koon Hoi Chow v Pretam Singh* [1972] 1 MLJ 180b the requirement to be satisfied by the applicant is stated thus: G

The applicant must show not only that he has a legal right to have the act performed but that the right is so clear and well defined as to be free from any reasonable controversy. The order cannot issue when the right is doubtful, or is a qualified one or where it depends upon an issue of fact to be determined by the respondent. H

[63] I find that the learned trial judge had not erred in his appreciation of the law or the facts in considering whether mandamus could be issued. In my judgment, the learned judge had properly exercised the remedial jurisdiction in granting mandamus against the IGP. The learned judge had alluded to s 20(3)(f) and to s 3(3) of the Police Act. Section 3(3) provides: I

A (3) The (Police) Force shall subject to this Act be employed in and throughout Malaysia (including the territorial waters thereof) for the maintenance of law and order, the preservation of the peace and security of Malaysia, the prevention and detection of crime, *the apprehension and prosecution of offenders* and the collection of security intelligence. (Emphasis added.)

B

[64] Having considered the relevant provisions in the Police Act, His Lordship made reference to the case of *Syarikat Kenderaan Melayu Kelantan Bhd v Transport Workers' Union* [1995] 2 MLJ 317; [1995] 2 CLJ 748 where the Court of Appeal states at p 342 (MLJ); p 765 (CLJ):

C An inferior decision making authority, whether exercising a quasi-judicial function or purely an administrative function has no jurisdiction to commit an error of law.

...

It is neither feasible nor desirable to attempt an exhaustive definition of what D amounts to an error of law for the categories of such an error are not closed. But it may be safely said that an error of law would be disclosed if the decision maker asks himself the wrong questions or takes into account irrelevant considerations (what may be conveniently termed an anisminic error) or if he misconstrues the terms of any relevant statute, or misapplies or misstates a principle of the general law.

E Since an inferior tribunal has no jurisdiction to make an error of law, its decisions will not be immunised from judicial review ....

[65] The learned judge then made the following finding:

F The IGP was labouring under the misconception that there were two conflicting orders; one from the Shariah Court giving custody of the youngest child to the father and another order from the civil High Court giving custody to the mother. Whilst that may be so, there is no order of recovery issued by the Shariah Court requiring the police to search for the child and to recover the child. That is obvious as the child is for all intents and purposes with the father.

G

There is also no contempt order taken out by the father of the child from the Shariah Court as the mother is not in contempt of court. However there is a recovery order issued by the civil High Court as well as the warrant of committal against the father of the child. Thus whilst there is no order for the police to execute from the Shariah Court, there are two orders for the police to execute issued by the civil High Court H which is the recovery order and the warrant of committal.

...

There are thus only the two civil High Court orders for enforcement. The IGP then cannot refuse enforcement of the civil High Court orders as that would be a I dereliction of his duty under the Police Act. Only the police is empowered to enforce a warrant of committal and not layman or any other persons. So too the recovery order for under the Child Act 2001 where the resources of the state may be employed to trace and recover a child pursuant to an order issued by the court.

If his declared intention as admitted by him is that he would not execute the civil High Court orders, then an order in mandamus shall be issued to compel him to act in accordance with the law.

The IGP further erred in law when he laboured under the misapprehension that he may be subject to the contempt action if he had refused to execute the custody order of the Shariah Court or if he had proceeded to execute the two orders of the civil High Court. To begin with there is no custody order for him to execute from the Shariah Court as there is no recovery order nor a committal order.

[66] The learned judge further said:

The High Court being a superior court established under the Federal Constitution and on which the judicial powers of the Federation are vested, does not act in vain. The orders issued by it cannot be disregarded with impunity and breach of it would give rise to enforcement proceedings, the most serious of which would be contempt of court. ...

Article 126 of the Constitution states that '... a High Court shall have power to punish any contempt of itself'. Section 13 of the CJA states that '... the High Court shall have power to punish any contempt of itself'.

Paragraph 10 to the Schedule (read with s 25(2) of the CJA) confirms that the High Court has the 'power to enforce a judgment of the Court in any other manner which may be prescribed by any written law or rules of court'.

...

A refusal to execute a warrant of committal which expressly called on the police to apprehend the contemnor and to escort him to the prison, in this case in Tapah, and there to be detained and kept in safe custody, would be to challenge the authority of an order issued by a superior court as provided for under art 121 of the Federal Constitution. It would be to denude the High Court order and warrant of committal of meaning and effect such that it is toothless not worth more than the paper it is written on.

I agree with learned counsel for the applicant that such a decision frustrates the judicial power of the federation by rendering the court's power to order the enforcement of the custody order, through committal proceedings, ineffective and illusory. The decision is a gross misapprehension of the established fact that the High Court, at all times, commands the power to order the enforcement and execution of its judgments and orders. The decision is therefore tainted with an error of law and unreasonable in the circumstances of the case. The decision cannot be sustained and must yield to a mandamus order.

[67] I agree with the above finding of the learned judge. And keeping in mind the Federal Court judgment in *Subashini*, I find that there is no appealable error committed by the learned judge that warrants appellate intervention.

[68] It cannot be denied that the mother has a legal right to the child. Her right is not doubtful nor is it a qualified one. The right had been determined by the High Court. The warrant of committal had not been cancelled and the recovery order had not been set aside. The IGP has a clear duty under the law to execute the warrant of committal to apprehend the father (who not only had disobeyed the High Court order but had offended s 52 of the Child Act) and to give effect to the recovery order. The committal order and the recovery order is the final remedy available to the mother to recover the child. There is no other avenue that the mother could resort to.

[69] It must be emphasised that quite apart from the fact that the orders issued by the High Court are valid orders, as found by the learned judge, there is no order from the Shariah Court requiring the police to perform any act or duty as opposed to the warrant of committal and recovery issue issued by the High Court which are specifically directed to the police. Based on the above facts, I find that the IGP had taken irrelevant consideration and had acted unreasonably in refusing to execute the said orders.

[70] In the circumstances of the present case, I am satisfied that mandamus should be granted to enable justice to be done. I therefore dismiss the appeal with no order as to costs.

Appeal allowed.

Reported by Ashok Kumar